ZONING BOARD OF ADJUSTMENT FEBRUARY 3, 2016 MEETING DRAFT MINUTES

Board members present included Chairman Christopher Carley, Nicholas Wallner, Andrew Winters, Rob Harrison and James Monahan. Also present was Zoning Administrator Craig Walker and Clerk of the Board Rose Fife.

44-15 <u>Richard Murray</u>: (Request for Rehearing on behalf of abutters Joseph Richards and Ralph Wilson) Applicant requests that the Board overturn the Zoning Administrator's decision that since a determination cannot be made that a Commercial Dog Kennel (Principal Use M-8) is a prior, non-conforming, valid use of the property it is prohibited under the existing ordinance for property located at 73 Shaker Road in a RS Residential Single Family District.

Carley asked the Board members if they had read the information that was provided to them. The Board had. He then asked if the Board felt that they had made an error in fact or law. Wallner said no. Harrison said no. Winters said no but there was a lot of evidence that the Board weighed and made a determination balancing the two sides and a lot of similar points are being raised in this memo. Monahan said no new facts came forward in what was submitted. Carley said that the Board had a specific conversation about relocating a non-conforming use on a property and the legal advice the Board got was that a non-conforming use could be relocated on a property without affecting its status as pre-existing.

DECISION: A motion to deny the rehearing request was made by Monahan, seconded by Harrison and passed by a unanimous vote.

- **O1-16 Daniel Whyte:** Applicant wishes to convert an existing 3 unit residential building to a 4 unit residential building and requests the following:
 - 1) Variance to Article 28-2-4(j), Table of Principal Uses, and applicable supplemental standards under Article 28-5-3, to permit the conversion of an existing residential building to accommodate 4 units (use A-9) where such conversions are not permitted,
 - 2) Variance to Article 28-5-3(b)(1), Minimum Lot Size, to apply the minimum lot size for conversion applicable to a CU Commercial Urban District to the RS Residential Single-Family District since both have a base lot size of 12,500 square feet,
 - 3) Variance to Articles 28-4-1(e), Maximum Lot Coverage & 28-4-1(h), Table of Dimensional Regulations, to permit a total lot coverage of 55% where a maximum lot coverage of 40% is allowed,
 - 4) Variance to Article 28-7-7(e), Minimum Driveway Widths to permit;
 - a) the driveway on the west side to remain at 17 feet where 24 feet is required,
 - b) the driveway on the east side to be 22 feet wide where 24 feet is required,
 - 5) Variance to Article 28-7-7(g)(1), Parking Restrictions in the Required Front Yard, to permit one parking space within the required front yard on the west side of the building,
 - 6) Variance to Article 28-7-8(a), Restriction on backing into street, to allow existing parking configuration on the west side of the building that may require vehicles exiting the driveway to back out into the street,
 - All for property located at 35 37 Clinton Street in a RS Residential Single-Family District.

Attorney Mark Puffer of PretiFlaherty testified as well as Mark Sargent from Richard Bartlett & Associates and Daniel Whyte.

Attorney Puffer stated that his client would like to convert an existing 3 unit building into 4 units. He submitted a new plan that is different than their original submission. It removes the need for a few variances that were on the notice. Craig Walker noted that he had not seen the new plan before tonight. Attorney Puffer noted that the first change was to remove the parking space within setback of Clinton Street. That is item #5 on the agenda. Item #6 on the agenda can also be removed. There is now a turnaround area vs. backing into the street. They have reduced the number of spaces required. They no longer need 11 spaces, they scaled it back to 8 spaces total. There will be 3 on the westerly side, 2 in the garage and 1 where it says existing parking space on the plan. That is two spaces per unit. That request was #4b which is no longer needed.

Carley asked if request #1through 4a is what the Board is hearing tonight. Attorney Puffer said that is correct. The drive on the easterly side will be widened to 24 feet. Attorney Puffer said they are willing to be flexible on that. There is a provision to go to the Planning Board to reduce width of driveway to 18 feet. They will not be able to meet the lot coverage requirement. They will have 52% lot coverage if they narrow the easterly driveway. There will be no expansion or change of the exterior of the building. They are taking 3 units and making it into 4 units. The 3 units that exist have 7 bedrooms. Two units will be two 2 bedroom units and two will be one bedroom units. At 37 Clinton Street, the westerly side of the building towards Dartmouth Street is one large handicapped accessible unit that was added on in 2006 by the prior owner. It's a very large unit, upstairs and downstairs. They would change that unit to a 1 story unit. The third improvement is that the number of parking spaces will be in compliance with the Zoning Ordinance. The improvement would be that there will be no backing into the street.

Dan Whyte testified. He moved to Concord and looked for a place for a year and a half. He purchased this property and wants to fix it up to become more luxury type apartments. He liked the handicapped apartment as the hospital is so close and it will give someone a nice affordable place to live.

Attorney Puffer went through the criteria for a variance. There will be fewer bedrooms than there were before. There are special conditions to the property as it's an existing grandfathered 3 unit building with a handicapped unit. That is unique. This will not be contrary to spirit of ordinance as it allows expansion of nonconforming use as long as it doesn't occupy more land and this will not. It is not contrary to public interest: The 4 units will be located in an existing building and the driveway/parking area will be improved. The driveway situation will be improved by not backing out into the street. The handicapped unit will be affordable and practical. There is substantial justice in granting these variances. There is no harm to the general public. Denial will prevent the building from being used to its best use. It will not diminish surrounding property value as it will be the same building and it is a large lot.

Monahan asked if tenants were backing onto Clinton Street now. Attorney Puffer said they were. Harrison asked about the handicapped unit. Mr. Whyte said that they will be taking the existing second floor and using that area to make the 4th unit. The bottom floor has a handicapped ramp and lift. He went over the layout of the handicapped unit and its accessibility.

Mr. Sargent said that the handicapped unit is associated with the unit on the west side of main building. The proposal is to separate the lower unit from the 2 story so it's a true accessible unit.

Harrison asked if any other buildings in the area have this amount of lot coverage. Attorney Puffer didn't know. Harrison said that the request is for a lot of lot coverage relief. Attorney Puffer said that was due to the parking and driveway.

Mr. Whyte said that 2 units do not have a driveway and this would alleviate that. Harrison asked if it was a working 3 family now. Mr. Whyte said it was but the current tenant doesn't have a license or a vehicle.

Attorney Puffer said that they have applied to the Planning Board for a Conditional Use permit for a second driveway cut and it has been suspended pending the Zoning Board's determination.

Winters asked what the current lot coverage is now. Is the only change in lot coverage associated with adding the driveway? Attorney Puffer said yes. Mr. Sargent said the lot coverage is probably close to the 40%. Winters questioned why the Board was being asked to make a determination on request #2. Attorney Puffer explained. Walker stated that he added that request to err on the side of caution as we are a permissive zoning ordinance and what is not specifically permitted it is not allowed. There are specific minimum lot sizes in the other districts for a conversion. Winters asked if the other requests were granted and they didn't address #2 how would that affect the applicant. Walker said this provides protection there. There is also a provision for elderly housing in the RS zone which requires 5 acres. Carley asked if nowhere in this zone a conversion to 4 units is permitted or 4 unit buildings permitted. Walker said yes outside of elderly housing. Monahan asked if the lot coverage calculations have been done if it is approved for an 18' wide drive. What would the lot coverage be then? Attorney Puffer said it would lower it to 51 or 52%. Monahan asked if they would you lose a parking spot? Attorney Puffer said no it would narrow the area to the driveway, it would still be 8 spaces.

In favor: none.

In opposition: Jonathan Vinovich of 5 Princeton Street. He would like to oppose this variance. He bought a single family home 6 years ago in a single family zone with single family homes in it. That is what the neighborhood consists of. If this were granted it would hurt his property values. If granted what would prevent any of his neighbors from asking for the same thing. His concerns were that there were a lot of variances requested to make this project happen. He realizes that they changed the number of variances requested but there is still enough to change the neighborhood. This property was grandfathered so it doesn't meet the requirements for a 3 family. He's not sure what would make the handicapped unit affordable. Carley said that affordability of rent was not in the Board's purview to decide. The building size vs. the lot size already exceeds what is required for 3 units. It doesn't meet the minimum for what it is now so why should it be increased. They are adding another whole parking area. This community has decided this area should be single family.

Letters from Thomas Weston of 33 Clinton Street; the property to the east. He doesn't oppose the proposal but has concerns with removing shade trees and an additional driveway. He was concerned with backing into the street and with the width of the driveway. He felt that there was no positive benefit in granting the appeal. It will change the character of the area and diminish property value. Charles and Eleanor Averill of 6 Princeton Street object. They believe most families have more than one vehicle and it would not be fair to the neighbors or traffic on Clinton Street.

Code: none.

Rebuttal: Attorney Puffer stated that the parking situation and backing into street will be improved by this proposal. The existing parking situation is dire. This will help that situation. Each variance is a unique and separate application and they feel this is a unique application as it is an existing 3 unit in a single family area. And it has a handicapped unit. Winters asked what the current units have for bedrooms. Attorney Puffer stated that 37 Clinton Street has 4 bedrooms up and down and 3 bedrooms in the other 2 unit on the easterly side that exists. Monahan asked if trees were going to be removed where the new driveway is going to be placed. Attorney Puffer stated that some will need to be removed but they will try to save as many as they can. They block the view from Clinton Street and not the neighbor.

DECISION: Move denial of all variances was made by Harrison. Harrison withdrew his motion.

Winters stated that this is a special condition as it is an existing use for a multi-family and even though the rest of the neighborhood is single family, this isn't going to change. He doesn't believe it's an unreasonable modification to what they have. They came into it with it having a handicapped unit. Harrison not comfortable expanding it to a 4 unit. It's working as a 3 unit now. Monahan noted some improvements to the property as in less backing into traffic but it chews up a lot of lot size; up to 55%. Harrison said there is a lot more lot coverage; more

impervious surfaces. Monahan felt that adding the driveway and parking lot is an issue. There are pluses and minuses. Winters asked what if they came in to just ask for a parking lot. Harrison stated that it is a 3 unit building, one person doesn't drive, they then would only accommodate 4 parking spaces and it has been working that way. Carley stated that they could accommodate parking with less pavement. Wallner felt that the hardship was that it is a 3 unit and should have 6 parking spaces and it doesn't and as it exists it creates a hazard. He would be persuaded by that hardship. Carley agrees with Harrison. They can argue building is unique but its characteristics don't require that it be a 4 unit. It does require doing some things that aren't consistent with the intent of the ordinance. He feels that they fail the hardship test. Monahan will vote against denial. He would limit the size of the driveway.

Variance request #1: A motion by Monahan to grant the request, seconded by Winters and passed by a 3-2 vote with Harrison and Carley in the minority.

Variance request #2: A motion to grant was made by Winters based on the understanding that the intent of this request is to state that this lot size meets the lot size required hypothetically in this district. Walker tried to explain that under the Table of Principal Uses there is a category to convert residential buildings not more than 5 units. Under Article 28-5-3 there are supplement standards to meet minimum lot size and set back requirements and no increased floor area, etc. This property meets all that but it does not meet the minimum lot size as there is no defined size for this district. Where that doesn't exist you can't have that conversion without a minimum lot size. He read the article into the record.

A motion to Table was made by Winters. Monahan felt it doesn't burden the applicant. Winters said that there is no minimum lot size in this district so there are no standards. Motion to table failed for lack of a second. A motion to approve the request #2 was made by Monahan, seconded by Winters and passed by a 3-2 vote with Harrison and Carley in the minority.

Variance #3: Monahan wants to approve with the condition that driveway be no more than 18 feet wide to try to get lot coverage down to 52%. Carley doesn't feel they can do that as he is asking for greater relief than the applicant asked for as a 24 foot driveway is the minimum requirement. Walker said that they are capable of getting a Conditional Use permit for an 18 foot driveway. Monahan asked if the Planning Board can impose limitations. Carley said that they can ask for conditions to be met. Carley then realized he was incorrect that the Board could put those conditions on it because driveway width relief does not require action by the ZBA. Monahan made a motion to grant the request to reduce the percentage of lot coverage to reflect the driveway reduction to be 18 feet wide, seconded by Winters and passed by a 3-2 vote with Harrison and Carley in minority.

Variance #4a: A motion to approve the request was made by Wallner, seconded by Monahan and passed by a unanimous vote.

Variance 4b, 5, 6 were withdrawn by the appellant.

02-16 Nouria Energy Corporation: Applicant requests a Variance to Article 28-6-9 (a) & (b), Table of Maximum Sign Dimensions & Permitted Building Signs, to install 4 affixed building signs with a total combined area of 62 square feet where the Ordinance allows a maximum of 3 buildings signs with a total combined area of 50 square feet for property at 242 Sheep Davis Road located in an IN Industrial District.

Attorney Richard Uchida of Hinckley Allen law firm testified. Bob Richard, project manager for Nouria was also available to testify. They are seeking a 62 s.f. building sign where 50 s.f. allowed. They rent the site. They do not own site. This is a 6 acre parcel. It stretches down to the river. Only the front of the site is developed. It is on the corner of N. Pembroke Road in the IN zone. Across the street is the Gateway zone. This is one of 2 retail uses in this IN zone. They only occupy half of the building and the other half is vacant right now. They are not

aware of any immediate plans for the second tenant. The parcel is unique as it is affected by a wide right of way. The Route 106 right away is 100 feet wide and most of that is on their side of road. There is 38 feet from edge of pavement to their property line. They then have to sit 50 feet from that property line. The signs will be 100 feet away from a motorist coming along there. The signs there today there is a 10 34 feet high and 34 s.f. freestanding sign. It has 2 Food Mart signs over the two entrances. There are 2 shell signs on the canopies. They want to keep the freestanding sign as it is. They want to change out the shell wording with a shell symbol on the canopy and 2 new Food Mart signs over the entrances. It does increase the signage to 62 s.f. where 50 s.f. is allowed. The site is unique as the area between the road and the property line; the south end of the building is what they occupy; they haven't used all of their freestanding signage; during the winter you can't see the freestanding sign; and it is one of 2 retail uses in the industrial district. All 4 signs aren't being jammed onto the building. They are asking for 2 signs on the building and 2 on the canopies. The canopy signs are getting smaller. Food Mart signs are larger due to the white box around them. If you measure the boxed letters the sign would only be 9 s.f. each but because it is in the box they are 23 s.f. each. They currently have 4 affixed signs. There is no evidence of any adverse impact to the neighbors. Relief would not detract from the area. This is a cleaner and crisper sign package. The building sign is smaller on the canopy. They are not sure how 4 affixed signs came to be as there are only 3 allowed.

Carley asked why not make the box smaller? Bob Richard said they are standard size as they are now and he is not sure that they could shrink them. Winters asked why they can't you use the extra freestanding sign allowance to accomplish what you want to do? Attorney Uchida stated that they are not as high or big for the freestanding sign and want to trade off some of that for additional affixed signage. Walker clarified that was not transferrable.

In favor: none.

In opposition: none.

Code: none.

DECISION: A motion to grant was made by Winters, seconded by Wallner and passed by a 4-1 vote with Carley in the minority.

Winters felt that the special conditions are that the traffic is coming mostly from the north bound and that section of the building is not theirs. It seems consistent with the purpose of the Ordinance. It won't create any traffic hazard. His inclination is to grant the request. Carley felt that the food sign box size could be changed.

Nouria Energy Corporation: Applicant request an Equitable Waiver pursuant to Article 28-9-3(e)(3), Equitable Waiver of a Dimensional Requirement, to allow the continued use of an existing free-standing sign which is 30 feet tall and contains 227 square feet of sign area where the current ordinance (Article 28-6-9, Table of Maximum Sign Dimensions for Non-Residential Districts) only permits freestanding signs of 20 feet in height and in the instance of this property, 66 and 7/10ths square feet in area, for property located at 24 Loudon Road in a GWP Gateway Performance District.

Attorney Richard Uchida of Hinckley Allen testified. Bob Richard Project Manager was also available to testify. They don't own the site but maintain the site for Shell. He passed out copies of equitable waiver section of the Ordinance. It is the Shell freestanding sign which was put up in about 2002 by their predecessor. They cannot find a Sign Permit for this sign. But the sign is there. That sign replaced the old big Texaco sign that was on that site. That Shell sign was in the Planning Board site plan review approval but no sign permit was approved or in the packet. Even though it was in the extremely old ordinance it didn't satisfy the ordinance requirements. That sign is not legal.

Equitable waiver process here is different due to age of sign. They redeveloped the site in 2002. It is a 1.5 acres lot located between Loudon Road and old Gully Hill Road right of way. The sign was put up around 2002 and because of the plaza the sign sits about 100 feet back from the driveway that goes into the El Rodeo restaurant and about 50 feet from the edge of the pavement. Under the old ordinance that was in place it was a BB zoning district which allows a 30 foot high sign and up to 250 s.f. of sign area, but no perimeter dimension of sign can exceed 16 feet in length. They would like to preserve the current sign. In the ordinance you are allowed by state law to grant an equitable waiver. It is allowed for dimensional relief, not uses. The sign is permitted in the district. If the dimensional problem has existed for more than 10 years then the fault of how it came about it is no longer an issue. Out past 10 years the construction or investment in ignorance is presumed and the statute doesn't require proof of innocent intent. It is not like a variance where they need to show hardship. Even if an equitable waiver is granted it doesn't confer on this sign legal nonconforming use. Elements of c &d of the state law: The sign has been there 13 or 14 years and they are not aware of any complaints. They are not aware of any adverse impacts of health, safety or welfare. It doesn't cause a nuisance. A lower sign with all the foliage would create a greater problem vs. a lesser problem. It doesn't impact present or future use of land. The cost to make the correction would be that they have to take the sign down, reduce it to 20 feet high and cut it down to 66 s.f. It would cost thousands of dollars. There is no benefit in doing that. He feels that they satisfied the equitable waiver requirements.

Winters asked when they took over the site. Mr. Richard said 5 years ago.

In favor: none.

In opposition: none.

Code: Walker stated that he's not challenging tonight's discussion but he does want to reserve the ability to challenge this type of equitable waiver in future circumstances. The ability to use the equitable waiver in a situation of this nature where a permit was not originally obtained doesn't sit well with him. An equitable waiver is supposed to be used when there was an honest mistake. In this situation there wasn't a permit issued. Carley asked about Section (e) of the RSA (Ordinance). Walker stated that even under the RSA one of the last sentences it says in this section is that it shall not be alter the principal that owners of land are bound by constructive knowledge of all applicable land use requirements. He wants to reserve that right so that in the future he may argue that an equitable waiver may not be appropriate when a permit has not been issued. Attorney Uchida stated that the reason that the legislature set 10 years for a time line is because at that time people may not remember who knew what.

DECISION: A motion to grant the request was made by Winters as they have met (c) & (d) in light of (e), seconded by Harrison and passed by a unanimous vote.

Winters felt that the cost would outweigh public benefit. It's not a nuisance in that area. Harrison stated that it has existed over 10 years.

O4-16 City of Concord: Applicant requests non-conforming status be granted for residential development purposes, for a non-compliant lot and requests a Variance to Article 28-8-3, Non-conforming Lots, Section (2), to grant non-conforming status to a 4,878 +/- square foot lot with 65.05 +/- feet of frontage which lot did not meet the minimum lot size and frontage standards which were in effect at the time the lot was created circa 1969 (minimum requirements in 1969 were 10,000 SF lot area & 80' frontage), and has not been conforming since that time, for property located at 51 Bradley Street in an RN Residential Neighborhood District.

Carlos Baia of the City of Concord testified. The property is a mid-block, flat rectangular property. It is a 4,670 s.f. lot size. The lot was retained over 50 years ago for the Langley Parkway project. This property is no longer

necessary for that route. The City would like to make this a productive parcel by providing a future buyer an opportunity to build a home on this property. It would be a benefit. The lot was conveyed to the City of Concord in July of 1969. At that time it was an R2 zone which required a 10,000 s.f. lot with 80 feet of frontage. It is now an RN zone with the same lot size requirements. This property is indistinguishable from other single family lots. They hit every one of the single family lots in the area and a list of 29 lots are found in the packet given to the Board. Only 2 of those lots would comply with today's requirements. Over 90% of single family lots in this area are in the same situation. It's not significantly different from properties in the neighborhood. It is not contrary to spirit and intent of the ordinance as the Ordinance as developed and evolved from 1960 to today has no nexus to what is there now. This lot is 'no man's land' as it's been there for a half century empty. If someone buys the property it would add to the neighborhood not detract from the neighborhood.

Monahan asked if the abutter has a structure that goes into the other lot. Mr. Baia said that sometimes the GIS lines don't line up to the property lines. They would have to clarify any encroachments at the time of the sale. Monahan asked if the City had talked to the abutter. Mr. Baia said that Paul Gendron the City's Licensed Land Survey has been in touch with one of the abutters that he has a fence that is on the property. The abutter has asked to remove the fence from the City's property. There is interest in acquiring property.

Mr. Baia said that in looking at this the City has so many lots that are non-conforming that maybe the zoning should be changed. But that is a long conversation and lots of input is needed. Winters asked if given the way this lot is currently zoned, are you saying this lot is not distinct. Mr. Baia stated that this lot is very similar, so their contention is that they should be allowed the same as what is there now.

Monahan asked why the City is coming forward now to request relief. Mr. Baia said that The City has been looking at their property inventory and they are trying to move forward to get these lots off the roster. As the tax base grows the tax rate doesn't have to increase. They have had interest from people in the neighborhood to acquire this parcel.

In favor: none.

In opposition: Meredith Hatfield of 5 Perkins Street. She has been asked to speak for the neighbors who also oppose the request. She can see the property but she doesn't physically abut it. Many are disappointed that the City hasn't had any kind of public outreach to the abutters. She doesn't feel the City has met its burden that it needs or deserves a variance. The City is not showing that it is a unique property. Many of the homes were built before zoning. That is why many houses don't meet the requirements. This is a very busy area. Relief granted would be contrary to spirit and intent of the Ordinance. It is a dense neighborhood and this would make it denser. It would impact abutters. The property doesn't appear to have room for a driveway. The neighborhood already has parking issues as the Knights of Columbus are nearby. She spoke about parking congestion in the area. Granting the request would diminish the value of the surround properties. The neighborhood has two vacant homes within sight of this property. Other challenges of the property are parking. She feels they would be back before the Board for other variance requests. Ten others are listed in opposition. Dana & Holly Shay, Nancy Mellet of 11 Bradley Street, Mary & Bob Gile, the Beloveaus, the Woods all live on Penacook Street are all opposed.

Jack Harden, 49 Bradley Street, who is a direct abutter. He has been in contact with Paul Gendron about the fencing. The previous residence of 49 Bradley Street used the City lot for a parking lot. He wants to take the fence down and has talked to the City about maintenance of the trees and the lot in general. They asked then about purchasing the property. The hardship for selling the property is not necessarily there because they want to buy it and add it to their property. There are currently vacant houses down Bradley Street. What value is a house going to add where there are already vacant homes?

Code: none.

Rebuttal: Carlos Baia stated that the City's request does not mandate that whoever buys it has to build a home. It only gives them an opportunity. They want to offer housing and make it productive on the tax rolls. Mr. Harden has inquired about buying the property. The City Council has asked him to come before the Board with this request.

Carley asked what is the size of the buildable area. Craig Walker stated that there is a building envelope of 1576 s.f..

DECISION:

Carley stated that the lot is undersized but not different from area lots. The neighbors have a concern that this will push the neighborhood into greater density.

Monahan asked for clarification of the drawing to Walker. Walker explained the building envelope. Monahan asked if there were no space for driveway. Walker stated that driveways have a 5' setback. Monahan asked if there were room for an 18 foot driveway. Walker stated that the driveway could be as little as a 10 foot driveway. Monahan recalls when the law school was here before us for parking relief. The Board Tabled the request while the law school met with the neighbors. He is wondering if given the neighbors feedback tonight if it would benefit the City to spend more time with the neighbors.

A motion to Table the request was made by Monahan, seconded by Wallner and passed by a 4-1 vote with Harrison in the minority pending a report back about discussions with the neighbors. The Board recommended that the City confer with the neighbors before returning to the ZBA.

Winters noted that there is nothing special or different about the property. It's the same as others in the neighborhood. So it's hard for him to see how they could grant a variance. Harrison said it was very similar in size. Winters stated that the hardship exists if there's something different but will agree to table.

OTHER BUSINESS:

Minutes from January 2016. A motion to approve the Minutes was made by Wallner, seconded by Monahan and passed by a unanimous vote.

A TRUE RECORD ATTEST,

<u>Rose M. Fife</u>, Clerk Zoning Board of Adjustment